No. 617

IN THE

Supreme Court of the United States

October Term, 1952

DISTRICT OF COLUMBIA, *Petitioner*,

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,
EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

DIVISION OF PRINTING AND PUBLICATIONS—D. C. GOVERNMENT

INDEX

SUBJECT INDEX

IN THE

Supreme Court of the United States

October Term, 1952
No.

DISTRICT OF COLUMBIA, *Petitioner*,

v.

JOHN R. THOMPSON COMPANY, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The District of Columbia, through its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Municipal Court (R. 4) is not reported. The opinion (R. 25), the concurring opinion (R. 37) and dissenting opinion (R. 52) of the Municipal Court of Appeals are reported at 81 A. 2d 249. The opinion (R. 60), the concurring opinion (R. 89) and dissenting opinion (R. 100) of the United States Court of Appeals have not yet been reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered January 22, 1953 (R. 121). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

In 1872 and 1873 the Legislative Assembly of the District of Columbia enacted two laws which made it a penal offense for the owner of a restaurant in the District of Columbia to refuse service to a person on account of race or color. The Court of Appeals for the District of Columbia Circuit has held that these Acts are "presently unenforceable." The questions presented are:

1. Whether Congress has power under the Constitution to delegate to the District of Columbia authority to enact local anti-discrimination legislation such as the Acts of 1872 and 1873.

2. If Question 1 is answered in the affirmative, whether the Organic Act of 1871 constituted a delegation of such legislative authority to the Legislative Assembly of the District of Columbia; and whether the Acts of 1872 and 1873 were proper exercises by the Legislative Assembly of the authority granted it in the Organic Act of 1871.

3. If the Acts of 1872 and 1873 are held to have been valid when enacted, whether they are no longer enforceable as having been repealed or "abandoned".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are printed in Appendix A, infra, pp. 21-34.

STATEMENT OF THE MATTER INVOLVED

By "An Act to Provide a Government for the District of Columbia", approved February 21, 1871, 16 Stat. 419, Congress provided a territorial form of government for the ter-

ritory of the United States within the limits of the District of Columbia. By that Act Congress constituted that government a "body corporate for municipal purposes", and provided in Section 5 thereof

> "That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. * * *"

Section 18 provided:

> "Sec 18. *And be it further enacted*, That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted."

The Legislative Assembly enacted "*An Act regulating restaurants, and other public places, and for other purposes*", approved June 20, 1872, Laws, District of Columbia, Ch. LI (App. A, p. 26), and "*An Act regulating sales in restaurants, eating-houses, bar-rooms, sample-rooms, ice-cream saloons, and soda-fountain rooms; providing for posting up the ordinary prices for which sales shall or may be made in said establishments, requiring all persons respectable and well-behaved to be accommodated in said establishments at said prices and in the same rooms, and providing penalties to secure the regulation of sales in said establishments, and for the enforcement of this act*", approved June 26, 1873, Laws, District of Columbia, Ch. XLVI (App. A, p. 28). Subsequent to 1873 these Acts of the Legis-

lative Assembly were not enforced. (See opinion of Judge Clagett, footnotes 4 and 5, R. 41, 42). The provisions of the Act of February 21, 1871, providing an executive and a legislative assembly for the District of Columbia were repealed by the Temporary Organic Act of 1874, approved June 20, 1874, 18 Stat. 116.

On August 1, 1950, the Corporation Counsel of the District of Columbia filed in the Municipal Court for the District an information (No. 111019; R. 1) charging John R. Thompson Company, Inc., as a restaurant keeper in the District, with violation of the Acts of the Legislative Assembly of 1872 and 1873—by refusal of service, solely because they were members of the Negro race, to named well-behaved and respectable persons. The information was in four counts, the first charging violation of the Act of 1872, the second, third and fourth with violation of the Act of 1873 (R. 1-3). The Municipal Court, by Judge Frank H. Myers, *sua sponte*, entered an order quashing the information without arraigning the defendant (R. 22) on the ground that the said Acts of the Legislative Assembly had been held by him in an earlier prosecution against the same defendant (No. 99150), alleging similar violations on a different date (R. 17), to have been repealed by implication by the Organic Act of June 11, 1878 (R. 4). The District of Columbia took an appeal from that order to the Municipal Court of Appeals (R. 19).

The Municipal Court of Appeals, as to the first count of the information, affirmed the order of the Municipal Court, Judge Hood being of the view that both the 1872 and 1873 enactments were invalid as beyond the power of the Legislative Assembly (R. 52), Judge Clagett thinking that the 1872 enactment was repealed by the enactment of 1873 "at least so far as restaurants are concerned" (R. 48). As to the second, third and fourth counts of the information, the Municipal Court of Appeals reversed the order of the Municipal Court, Judge Clagett being of opinion that the

1873 enactment was valid when enacted (R. 47) and that it had never been repealed (R. 52), and Chief Judge Cayton being of the view that both the 1872 and 1873 enactments were valid when enacted (R. 32) and that both were presently enforceable (R. 32-36).

The Thompson Company petitioned the United States Court of Appeals for the District of Columbia Circuit for the allowance of an appeal from the judgment of the Municipal Court of Appeals in so far as it reversed the order of the Municipal Court quashing the information as to the second, third and fourth counts. The District, on its part, petitioned for the allowance of a cross-appeal from the judgment of the Municipal Court of Appeals in so far as it affirmed the order of the Municipal Court in quashing the information as to the first count. The United States Court of Appeals granted both petitions (R. 56), ordered the two appeals consolidated (R. 57) and *sua sponte* ordered the appeal and the cross-appeal heard in banc (R. 58).

The United States Court of Appeals, by a divided Court, affirmed the judgment of the Municipal Court of Appeals as to the first count of the information and reversed the judgment as to the second, third and fourth counts. Chief Judge Stephens and Judge Clark, Judge Miller and Judge Proctor held that the enactments of the Legislative Assembly were of the character of general legislation, the power to enact which the Congress could not constitutionally delegate to the Legislative Assembly, and that the said Acts were repealed by the 1901 Code (R. 85); Judge Prettyman thought it "unnecessary for the court to determine whether the enactments were legislation or were regulatory municipal ordinances" but concurred in the judgment announced by Chief Judge Stephens. His view was "If they (the Acts of 1872 and 1873) were general legislation they were void from the beginning and in any event were repealed by the 1901 Code. If they were municipal ordinances they were long ago abandoned by the regulatory authority

which originally adopted them" (R. 99). Judge Miller concurred "in the opinion of Chief Judge Stephens, but if the view that the enactments are regulatory ordinances were accepted," he agreed with what is said in Judge Prettyman's opinion (R. 100). Judge Fahy, Judge Edgerton, Judge Bazelon and Judge Washington dissented on the grounds that the Acts of the Legislative Assembly were local municipal ordinances (R. 102), lawfully adopted under a valid delegation of authority by Congress, and that the Acts of the Legislative Assembly have not been repealed and are presently enforceable (R. 100).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia Circuit erred

(1) In holding that the information could not be validly prosecuted;

(2) In holding that Congress did not have constitutional authority to delegate power to the Legislative Assembly to enact the Acts in question;

(3) In holding that Congress in the Act of 1871 did not effectively and constitutionally delegate to the Legislative Assembly authority to enact the Acts of 1872 and 1873;

(4) In holding that the Acts of the Legislative Assembly are presently unenforceable either because they were repealed or "abandoned";

(5) In holding that the Acts of the Legislative Assembly were invalid when enacted.

REASONS FOR GRANTING THE WRIT

I

The United States Court of Appeals for the District of Columbia Circuit has decided questions of general importance which have not been, but should be, settled by this Court.

By its judgment in this case the United States Court of Appeals has struck down as invalid Acts of the Legislative

Assembly of the District of Columbia by which the people of the District, through their lawfully elected representatives, prohibited racial discrimination in public eating places in the District of Columbia. The case thus embraces two subjects of substantial national and local concern—racial discrimination and Congressional power to grant home rule—for the Court of Appeals based its ruling on the premise that Congress could not, under the Constitution, delegate to the Legislative Assembly authority to legislate to prohibit acts of racial discrimination.

Importance to the Nation and the District of Columbia

The importance of this case to the people of the entire Nation is manifest. As Chief Judge Stephens pointed out in his opinion,

> "* * * the enactments, though applicable only in the District of Columbia, are, because they are applicable in the Nation's capital, of national interest." (R. 82)

The importance to the Nation of solving the problem of racial discrimination in the United States, and particularly in the District of Columbia, is so great that the President devoted a portion of his State of the Union Address to that subject. The President said:

> "Our civil and social rights form a central part of the heritage we are striving to defend on all fronts and with all our strength.
>
> "I believe with all my heart that our vigilant guarding of these rights is a sacred obligation binding upon every citizen. To be true to one's own freedom is, in essence, to honor and respect the freedom of all others.
>
> "A cardinal ideal in this heritage we cherish is the equality of rights of all citizens of every race and color and creed.

"We know that discrimination against minorities persists despite our allegiance to this ideal. Such discrimination—confined to no one section of the Nation—is but the outward testimony to the persistence of distrust and of fear in the hearts of men.

"This fact makes all the more vital the fighting of these wrongs by each individual, in every station of life, in his every deed.

"Much of the answer lies in the power of fact, fully publicized; of persuasion, honestly pressed; and of conscience, justly aroused. These are methods familiar to our way of life, tested and proven wise.

"I propose to use whatever authority exists in the office of the President to end segregation in the District of Columbia, including the Federal Government, and any segregation in the Armed Forces."

(Vol. 99, Congressional Record, February 2, 1953, No. 18, p. 783, daily issue; House Document No. 75, 83rd Congress, 1st Session, p. 13)

The Court will take judicial notice of the fact that for many years the people of the District of Columbia have been urging the Congress to restore to them some measure of home rule, i.e., the right to participate as Americans in their local and national governments. Partly in response to the petitions of the people of the District, and also motivated by the necessity of divesting itself of the details of municipal management in order to devote more of its attention to national problems, the Congress has been considering various plans for turning a greater degree of local government over to the District of Columbia.[1]

This problem of local self-government in the District of Columbia is of such national importance that in his State of the Union Address the President said of it:

[1] Bills to grant home rule have already been introduced in the 83rd Congress, H. R. 1395, S. 999.

> "Here in the District of Columbia, serious attention should be given to the proposal to develop and to authorize, through legislation, a system to provide an effective voice in local self-government. * * * *" (Id. p. 13).

The case is also of great importance to the people of the District of Columbia. By "* * * the enactment of March 7, 1870, of the 67th Council of the City of Washington (App. A, p. 35)—which the enactments of 1872 and 1873 of the Legislative Assembly substantially paralleled * * *" (R. 85) and by the said enactments of 1872 and 1873, the people of the District, through their lawfully elected representatives,[2] had taken action to stamp out the discrimination on account of race, color, or previous condition of servitude which the Court of Appeals judicially noted "* * * was customary in the District of Columbia at the time the enactments were promulgated." (R. 81)

These questions should be settled by this Court

The effect of the ruling of the Court of Appeals is threefold. First, it freezes the law of the District of Columbia in the pattern of racial discrimination which the people of the District of Columbia had thrice attempted, through their own representatives, to reject. Second, by holding that

> "* * * the enactments of the Legislative Assembly of 1872 and 1873 which are under question in the instant case were of the character of 'general legislation,' the power to enact which Congress could not constitutionally, and did not, delegate to the Legislative Assembly" (R. 79),

the Court of Appeals has erected a barrier to effective home rule in the District of Columbia. Third, under this decision, not only is Congress impotent to determine what degree of

[2] An Act to continue, alter and amend the charter of the City of Washington, approved May 17, 1848, 9 Stat. 223, ch. 42, Sec. 5; D. C. Code, 1951, p. XXXVIII.
An Act to provide a government for the District of Columbia, approved February 21, 1871, 16 Stat. 419, ch. 62, Sec. 5, 7; App. A, p. 21, 23.

legislative authority it is wise, expedient or desirable to delegate, within the terms of the Constitution, to a subordinate District of Columbia Government, but in the absence of "a precise criterion" by which to determine "what powers are strictly 'municipal' and may therefore rightly be conferred upon local corporations, and what powers are properly 'legislative' and cannot therefore be delegated" (R. 79), every delegation of legislative authority by Congress is subject to vague, unspecified standards which could only be determined after protracted litigation in the courts.

II

The United States Court of Appeals for the District of Columbia Circuit, in deciding the substantial questions here presented relating to the construction of the Constitution and of Acts of Congress, has not given effect to applicable decisions of this Court.

To determine whether or not the information in this case can be validly prosecuted, two preliminary questions must be answered. As stated by the Court of Appeals, those questions are:

> "* * * The first, were the enactments of the Legislative Assembly of 1872 and 1873 on which the information against the Thompson Company was based within the power of the Assembly; the second, were those enactments repealed." (R. 65)

In reaching the conclusion that

> "* * * the enactments of the Legislative Assembly of 1872 and 1873 which are under question in the instant case were of the character of 'general legislation,' the power to enact which the Congress could not constitutionally, and did not, delegate to the Legislative Assembly" (R. 79),

the Court of Appeals relied on only two decisions of this Court, *Stoutenburgh* v. *Hennick*, 129 U. S. 141, and *Metropolitan Railroad Company* v. *District of Columbia*, 132 U. S. 1. It approached the first question by approving the suggestion made by the Supreme Court of the District of Columbia in General Term in *Roach* v. *Van Risiwick*, MacArthur and Mackey's Reports 171, that

> "* * * for lack of a precise criterion, the determination of what powers are strictly 'municipal' and may therefore rightly be conferred upon local corporations, and what powers are properly 'legislative' and cannot therefore be delegated, is not always without difficulty." (R. 79)

It is respectfully submitted that the asserted lack of a criterion stems from the fact that the Court of Appeals failed to consider the decisions of this Court in cases decided before and after *Stoutenburgh* v. *Hennick*, 129 U. S. 141, defining the power of Congress to delegate legislative authority to the District of Columbia Government, and for that reason attributed to the *Stoutenburgh* decision an effect which this Court clearly did not intend to give it. It is further submitted that the decisions of this Court which were not considered by the Court of Appeals not only supply the needed criterion but show that this Court has never doubted that Congress has the constitutional power to, and in fact, did, delegate sufficient authority to the Legislative Assembly to enact the Acts in question.

Article I, Section 8, Clause 17, of the Constitution of the United States specifically empowers Congress "To exercise exclusive Legislation in all Cases whatsoever, over such District * * * as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *."

The word "exclusive" was plainly intended only to exclude the ceding states from exercising legislative authority

within the District of Columbia; it does not preclude Congress from delegating subordinate authority to a local government. *The Federalist*, No. 43; *Roach* v. *Van Riswick*, MacArthur and Mackey, 171, 174. To be sure, this Court in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147, held that a portion of an act of the Legislative Assembly was void in that it constituted a regulation of interstate commerce, since the latter subject-matter rested within the exclusive power of Congress. That case does not, as the majority judges in the Court of Appeals evidently believed, support a limitation on the power of Congress under the Constitution, if it sees fit to do so, to delegate to a subordinate legislative body in the District of Columbia authority to enact laws which are entirely local in nature and effect. On the contrary the Court, in an opinion by Mr. Chief Justice Fuller, said:

> "It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority; and hence while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity."

In 1904, in *Binns* v. *United States*, 194 U. S. 486, 491, in affirming a conviction under an Alaska penal statute, this Court again emphasized, in comparing the types of government provided for Alaska and the District of Columbia, the plenary power which the Constitution vests in Congress in legislating for the territories and the District:

"It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories, of a *quasi* state government, with executive, legislative, and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to this form. In the District of Columbia it had adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a territory, or transfer the power of such legislation to a legislature elected by the citizens of the territory. *It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may intrust to them a large volume of legislative power, or it may, by direct legislation, create the whole body of statutory law applicable thereto.*" [Emphasis supplied.]

In an earlier case, *Barnes* v. *District of Columbia*, 91 U. S. 540, 544, not cited by the Court of Appeals, this Court, in discussing the powers granted to the District of Columbia government created by the Organic Act of 1871, similarly recognized that the scope of such delegation of authority to a subordinate legislative body was for Congress to determine:

"A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The Legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again; it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often

as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the State, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the Legislature shall extend or contract the sphere of its action."

The same principles found further expression in *Metropolitan Railroad Company* v. *District of Columbia*, 132 U. S. 1. The Court in that case reviewed the course of congressional legislation from 1800 to 1889 applicable to the District of Columbia, and made the following pertinent observations:

"* * * All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior Legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative discretion. * * * It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a State; but the sovereign power of this qualified State is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. The subordinate legislative powers of a municipal character which have been or may be lodged in the city corporations, or in the District Corporation, do not make those bodies sovereign. Crimes committed in the District are not crimes against the District, but against the United States. Therefore, whilst the District may, in a sense, be called a State, it is such in a very qualified sense." [132 U. S. at pages 8-9.]

Accord: *Welch* v. *Cook*, 97 U. S. 541, 542 ("It is not open to reasonable doubt that Congress had power to invest the District Government with legislative authority, or that it did so invest that government, * * *"); *Mattingly* v. *District of Columbia*, 97 U. S. 687; *First National Bank of the City of New York* v. *Shoemaker*, 97 U. S. 692, 693.

As has already been stated, the doctrine of the above-cited cases was neither overruled nor modified by this Court's decision in *Stoutenburgh* v. *Hennick*, 129 U. S. 141. That case held only that Congress could not, and in the particular instance did not, authorize the District of Columbia to regulate interstate commerce. The "general" legislation which the Court in that case stated was not a proper subject matter for delegation to a subordinate legislative body in the District of Columbia is, therefore, legislation of a national nature which only Congress could enact, such as that relating to the regulation of interstate commerce. The *Stoutenburgh* case is not an authority, as the Court of Appeals in the present case apparently regarded it, for the view that the Constitution precludes Congress from delegating to a subordinate legislative body in the District of Columbia authority to enact local anti-discrimination legislation, even though in some other sense such legislation might be characterized as "general". Referring to earlier precedents dealing with the scope of the commerce clause, *e.g.*, *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, the Court in the *Stoutenburgh* case reaffirmed the exclusive power of Congress over "that class of subjects which calls for uniform rules and national legislation", as distinguished from "that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." (Citing *Cooley* v. *Phila. Board of Wardens*, 12 How. 299; and *Gilman* v. *Philadelphia*, 3 Wall. 713.) The word "general" should properly be restricted to that sense, i.e., "that class of subjects which

calls for uniform rules and national legislation" by the Congress.

Acting within the ambit of its constitutional powers, as defined in the cases referred to above, Congress in the Organic Act of 1871 provided that "the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act * * *; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District, in as ample manner as if this law had not been enacted." Sections 17 and 20 of the Act imposed various specific prohibitions upon the legislative authority delegated to the Legislative Assembly, *e.g.*, divorce, remission of fines, penalties or forfeitures, changing the law of descent, etc. None of these specific limitations is claimed to be pertinent to this case.

As Judge Fahy pointed out in his dissenting opinion, there "can be no doubt" that the two Acts involved in this case come within the broad limits of the authority granted by Congress. "They deal with 'rightful subjects of legislation'; their scope is 'within said District,' they are 'consistent with the Constitution of the United States',—a Constitution framed in the background of the principle that all men are created equal." (R. 101) Tested by the criteria enunciated by this Court, these Acts are plainly valid. They relate to the affairs of a particular locality. They do not purport to, and could not, have any application beyond the boundaries of the District of Columbia. They do not come within the scope of any subject of legislation, such as the regulation of interstate commerce, which is committed by the Constitution to Congress itself. They do not encroach on any subject of legislation which Congress in the Act of 1871 reserved for its own action.

On the basis of their conclusion that the Acts of 1872 and 1873 constituted "general" legislation, the four judges for whom Chief Judge Stephens wrote reached the further conclusion that the Acts were repealed by the District of Columbia Code of 1901, 31 Stat. 1189. Judge Prettyman, as an alternative ground for concurring in the result, stated that, if the Acts "were general legislation they were void from the beginning and in any event were repealed by the 1901 Code." (R. 99)

It is respectfully submitted that this conclusion as to the effect of the 1901 Code is erroneous. It should be emphasized, at the outset, that the 1901 Code did not specifically or expressly repeal these two Acts. On the contrary, the conclusion that the Acts were repealed is based upon certain general provisions of the Code. It is pertinent, therefore, to recall the admonition frequently made by this Court that "repeals by implication are not favored" and that the "intention of the legislature to repeal must be clear and manifest." *United States* v. *Borden Co.*, 308 U. S. 188, 198-199, and numerous authorities there cited.

Section 1636 of the 1901 Code, upon which the opinion of Chief Judge Stephens mainly relied, repealed "All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia * * * in force in said District on the day of the passage of this act * * * except: * * *

> "Third. Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations."

The Acts of the Legislative Assembly were clearly saved from repeal by the language of Section 1636. Both of those enactments imposed duties upon subordinates of the Commissioners of the District of Columbia—the successors in office or duty of the Register and the attorneys of the District of Columbia. Both enactments were "police regulations," as that term was defined by the Court of Appeals in *United States* v. *Cella*, 37 App. D. C. 433, 435:

> "A municipal ordinance or police regulation is peculiarly applicable to the inhabitants of a particular place; in other words, it is local in character. While municipal ordinances or police regulations are binding upon the community affected by them, they do not emanate from the supreme power of the state, which is the exclusive source of all general legislation."

See also *Johnson* v. *District of Columbia*, 30 App. D. C. 320, holding that an Act of the Legislative Assembly prohibiting cruelty to animals was a "mere police regulation" and hence saved from repeal under Section 1636 of the 1901 Code.

Both enactments in this case deal with the regulation of licensed public eating places, which Congress, by its enactments from the Act of May 3, 1802, 2 Stat. 195, to the present time, had committed to the regulatory authority of the local District governments. Both enactments related to municipal affairs only.

> "'Municipal' has been defined to be that which belongs to a corporation or a city, and to include the rules or laws by which a particular district, community, or nation is governed. It may also mean 'local,' 'particular,' 'independent.'" 27 Words and Phrases, Perm. Ed. 735.

Section 1640 of the 1901 Code provided:

> "Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia * * * of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

The enactments of the Legislative Assembly of 1872 and 1873 are neither inconsistent with nor replaced by any provision of the 1901 Code. Further, since these enactments are simply the ordinance of the Council of Washington of March 7, 1870, as modified by the Legislative Assembly—they "substantially parallelled" it (R. 85)—they were legalized and kept in force by Act of Congress up to the time of enactment of the 1901 Code. Section 91 of the Revised Statutes the District of Columbia, approved June 22, 1874, provided:

> "All laws and ordinances of the cities of Washington and Georgetown, respectively * * * not inconsistent with this chapter, and except as modified or repealed by Congress or the legislative assembly of the District since the first day of June, eighteen hundred and seventy-one, or until so modified or repealed, remain in full force."

Clearly, by enacting Section 1640 of the 1901 Code, Congress intended that such municipal ordinances as these enactments should remain in force until Congress itself modifies or repeals them. This Congress has never done.

Judge Prettyman's alternative ground, that the 1872 and 1873 Acts are no longer effective because they were abandoned through non-enforcement, is plainly without merit. It is elementary that "Failure to enforce the law does not change it." *Louisville & N. R. Co.* v. *United States*, 282

U. S. 740, 759; *Kelly* v. *Washington*, 302 U. S. 1, 14; *Chicago B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155, 162.

CONCLUSION

In every locality in the United States except the District of Columbia, the question whether or not to prohibit racial discrimination in licensed public eating houses would be decided in the American way, by vote of the people. Here, in the District of Columbia, the views of the majority must be left to conjecture, for until Congress provides the means, the people of the District of Columbia are powerless to register their will. The effect of the decision of the United States Court of Appeals in this case is to make it impossible for Congress, until the Constitution is amended, to provide the means for the people of the District of Columbia to decide this or any other question for themselves.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.;

CHESTER H. GRAY,
Principal Assistant Corporation Counsel, D. C.,

EDWARD A. BEARD,
Assistant Corporation Counsel, D. C.,
Attorneys for Petitioner,
District Building,
Washington 4, D. C.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article 1, Section 8, Clause 17:

"The Congress shall have Power * * *

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—"

Acts of Congress

"AN ACT to provide a government for the District of Columbia", approved February 21, 1871, 16 Stat. 419; District of Columbia Code, 1951, p. XLV:

"Sec. 5. *And be it further enacted,* That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. The assembly shall consist of a council and house of delegates. The council shall consist of eleven members, of whom two shall be residents of the city of Georgetown, and two residents of the county outside of the cities of Washington and Georgetown, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall have the qualification of voters as hereinafter prescribed, five of whom shall be first appointed for the term of one

year, and six for the period of two years, provided that all subsequent appointments shall be for the term of two years. The house of delegates shall consist of twenty-two members, possessing the same qualifications as prescribed for the members of the council, whose term of service shall continue one year. An apportionment shall be made, as nearly equal as practicable into eleven districts for the appointment of the council, and into twenty-two districts for the election of delegates, giving to each section of the District representation in the ratio of its population as nearly as may be. And the members of the council and of the house of delegates shall reside in and be inhabitants of the districts from which they are appointed or elected, respectively. For the purposes of the first election to be held under this act, the governor and judges of the supreme court of the District of Columbia shall designate the districts for members of the house of delegates, appoint a board of registration and persons to superintend the election and the returns thereof, prescribe the time, places, and manner of conducting such election, and make all needful rules and regulations for carrying into effect the provisions of the act not otherwise herein provided for: *Provided*, That the first election shall be held within sixty days from the passage of this act. In the first and all subsequent elections the persons having the highest number of legal votes for the house of delegates, respectively, shall be declared by the governor duly elected members of said house. In case two or more persons voted for shall have an equal number of votes for the same office, or if a vacancy shall occur in the house of delegates, the governor shall order a new election. And the persons thus appointed and elected to the legislative assembly shall meet at such time and at such place within the District as the governor shall appoint; but thereafter the time, place, and manner of holding and conducting all elections by the people, and the formation of the districts for members of the council and house of dele-

gates, shall be prescribed by law, as well as the day of the commencement of the regular sessions of the legislative assembly: *Provided*, That no session in any one year shall exceed the term of sixty days, except the first session, which may continue one hundred days."

"Sec. 7. *And be it further enacted*, That all male citizens of the United States, above the age of twenty-one years, who shall have been actual residents of said District for three months prior to the passage of this act, except such as are non compos mentis and persons convicted of infamous crimes, shall be entitled to vote at said election, in the election district or precinct in which he shall then reside, and shall have so resided for thirty days immediately preceding said election, and shall be eligible to any office within the said District, and for all subsequent elections twelve months' prior residence shall be required to constitute a voter; but the legislative assembly shall have no right to abridge or limit the right of suffrage."

"Sec. 17. *And be it further enacted*, That the legislative assembly shall not pass special laws in any of the following cases, that is to say: For granting divorces; regulating the practice in courts of justice; regulating the jurisdiction or duties of justices of the peace, police magistrates, or constables; providing for changes of venue in civil or criminal cases, or swearing and impaneling jurors; remitting fines, penalties, or forfeitures; the sale or mortgage of real estate belonging to minors or others under disability; changing the law of descent; increasing or decreasing the fees of public officers during the term for which said officers are elected or appointed; granting to any corporation, association, or individual, any special or exclusive privilege, immunity, or franchise whatsoever. The legislative assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or

individual to the District or to any municipal corporation therein, nor shall the legislative assembly have power to establish any bank of circulation, nor to authorize any company or individual to issue notes for circulation as money or currency."

"Sec. 18. *And be it further enacted,* That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted."

"Sec. 20. *And be it further enacted,* That the said legislative assembly shall not have power to pass any ex post facto law, nor law impairing the obligation of contracts, nor to tax the property of the United States, nor to tax the lands or other property of non-residents higher than the lands or other property of residents; nor shall lands or other property in said district be liable to a higher tax, in any one year, for all general objects, territorial and municipal, than two dollars on every hundred dollars of the cash value thereof; but special taxes may be levied in particular sections, wards, or districts for their particular local improvements; nor shall said territorial government have power to borrow money or issue stock or bonds for any object whatever, unless specially authorized by an act of the legislative assembly, passed by a vote of two thirds of the entire number of the members of each branch thereof, but said debt in no case to exceed five per centum of the assessed

value of the property of said District, unless authorized by a vote of the people, as *hereinafter* [hereinbefore] provided."

"Sec. 40. *And be it further enacted,* That the charters of the cities of Washington and Georgetown shall be repealed on and after the first day of June, A. D. eighteen hundred and seventy-one, and all offices of said corporations abolished at that date; the levy court of the District of Columbia and all offices connected therewith shall be abolished on and after said first day of June, A. D. eighteen hundred and seventy-one; but all laws and ordinances of said cities, respectively, and of said levy court, not inconsistent with this act, shall remain in full force until modified or repealed by Congress or the legislative assembly of said District; * * *."

Revised Statutes of the District of Columbia, approved June 22, 1874.

"Sec. 91. All laws and ordinances of the cities of Washington and Georgetown, respectively, and of the levy court of the District of Columbia, not inconsistent with this chapter, and except as modified or repealed by Congress or the legislative assembly of the District since the first day of June, eighteen hundred and seventy-one, or until so modified or repealed, remain in full force."

Code of Law for the District of Columbia, approved March 3, 1901, 31 Stat. 1189.

"Sec. 1640. Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law or of any British Statute in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, or of

the principles of equity or admiralty, or of any general statute of the United States not locally inapplicable in the District of Columbia or by its terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

Enactments of the Legislative Assembly

Act of the First Legislative Assembly approved August 23, 1871, Laws of the District of Columbia, Chap. LXIX, p. 87.

"An Act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia.

"Sec. 24. *And be it further enacted,* That all laws and ordinances of the corporations of Washington and Georgetown and the Levy Court, providing police regulations for the several businesses of the citizens of the District of Columbia, are hereby continued in force; and all acts and ordinances, or parts of the same, of the said corporations of Washington and Georgetown and the Levy Court and the District of Columbia, inconsistent with the provisions of this act, are hereby repealed; and whereas an emergency exists, this act shall go into effect immediately on and after its passage."

Act of the Second Legislative Assembly approved June 20, 1872, Laws of the District of Columbia, Chap. LI, p. 65.

"*An Act regulating restaurants, and other public places, and for other purposes.*

"*Be it enacted by the Legislative Assembly of the District of Columbia,* That keepers or owners of restaurants, eating-

houses, bar-rooms, or ice-cream saloons, or soda-fountains, at which food, refreshments or drinks are sold, or keepers of barber shops and bathing houses, must put in a conspicuous place in their restaurant, eating-houses, ice-cream saloons, or places for the sale of soda water, a scale of the prices for which the different articles they have for sale will be furnished.

Sec. 2. *And be it further enacted*, That persons violating the provisions of the above section are to be deemed guilty of misdemeanor, and, upon conviction in a court having jurisdiction, are to be fined by the court not less than twenty dollars, and not more than fifty dollars.

Sec. 3. *And be it further enacted*, That any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude, or any restaurant, hotel, ice-cream saloon or soda fountain, barber shop or bathing-house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, and at the same prices as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or soda fountain, as the case may be, and it shall not be lawful for the Register or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture."

Act of the Third Legislative Assembly, approved June 26, 1873, Laws of the District of Columbia, Chap. XLVI, p. 116.

"*An act regulating sales in restaurants, eating-houses, bar-rooms, sample-rooms, ice-cream saloons, and soda-fountain rooms; providing for posting up the ordinary prices for which sales shall or may be made in said establishments, requiring all persons respectable and well-behaved to be accommodated in said establishments at said prices and in the same rooms, and providing penalties to secure the regulation of sales in said establishments, and for the enforcement of this act.*

"*Be it enacted by the Legislative Assembly of the District of Columbia*, That the proprietor or proprietors, or keeper or keepers, of every licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or establishment in the District of Columbia, shall put up, or cause to be put up, and to be regularly kept up, or cause to be kept up, in two conspicuous places in the chief room or rooms of his, her, or their restaurant, eating-house, bar-room, ice-cream saloon, or soda fountain room, and in one conspicuous place in each small or private room, if any, used in connection with said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room, for the accommodation of guests, visitors, or customers thereat, printed cards, or papers, on which shall be distinctly printed the common or usual price for which each article or thing kept in any of said places or establishments to be eaten or drank therein is or may be commonly sold, or the price or prices for which the articles or things are or may be commonly or usually furnished to persons calling for, desiring, or receiving the same or any part or parts thereof, and no greater price or prices than those mentioned or contained on said cards or printed papers shall be asked for, demanded, or received from any person or persons for any of the articles or things kept in any manner

for sale in any of the places or establishments aforesaid, either by said proprietor or proprietors, keeper or keepers, or by their agents, employés, or any one acting in any manner for them.

"Sec. 2. *And be it further enacted*, That on or before the first day of November in each year the proprietor or proprietors, keeper or keepers, of each licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room or establishment in said District, as aforesaid, shall transmit to the Register of said District a printed copy of the usual or common price or prices of articles or things kept for sale by him, her, or them, as aforesaid, which shall be filed by the Register in his office, and unless he is notified of changes therein, the copy transmitted and filed in said office may be used in any case or proceeding under this act as prima facie evidence of the common or usual prices charged for the articles or things mentioned therein by the proprietor or proprietors, keeper or keepers, of any of the places or establishments aforesaid, and in a failure of any proprietor or proprietors, keeper or keepers, to transmit the copy aforesaid, the Register shall notify such person of such failure, and require such copy to be forthwith transmitted to him.

"Sec. 3. *And be it further enacted*, That the proprietor or proprietors, keeper or keepers, of any licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room shall sell at and for the usual or common prices charged by him, her, or them, as contained in said printed cards or papers, any article or thing kept for sale by him, her, or them to any well-behaved and respectable person or persons who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed

to eat or drink in said place or establishment: *Provided*, That persons of different sexes shall not be accommodated in the same room or rooms unless they accompany each other, or call for any articles or things together, or unless said room or rooms are ordinarily used indiscriminately by persons of both sexes.

Sec. 4. *And be it further enacted*, That if the proprietor or proprietors, keeper or keepers, of any place or establishment, as aforesaid, shall neglect or refuse to put up printed cards or papers of prices as provided for in the first section of this act, or shall refuse to send a copy or duplicate to the Register, as provided in the second section, or shall place or cause to be placed on said card or paper, or permit to be placed thereon any price or prices other or greater than that for which any article or thing is, or may be, usually and commonly sold or furnished by him, her, or them, or different from or more than is usually or commonly demanded or received therefor by him, her, or them, or by his, her, or their authority or direction, or shall demand or receive in any manner, or under any circumstances, or for any reason or pretence, in person or by any employé or agent, from any person or persons aforesaid, any sum or prices different or greater than is contained on said cards or papers, or than is usually and commonly asked or received for any article or thing kept for sale as aforesaid, or shall refuse or neglect, in person or by his, her, or their employé or agent, directly or indirectly, to accommodate any well-behaved and respectable person as aforesaid in his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or shall refuse or neglect to sell at the common and usual prices aforesaid in and at his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, to any such person or persons therein at said prices, any article or thing kept therein and in the

room or rooms in which such articles or things are ordinarily sold and served or allowed to be eaten or drank, or shall at any time or in any way or manner, or under any circumstances, or for any reason, cause, or pretext, fail, decline, object, or refuse to treat any person or persons aforesaid as any other well-behaved and respectable person or persons are treated at said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, he, she, or they, on conviction of a disregard or violation of any provision, regulation, or requirement of this act or any part of this act contained, be fined one hundred dollars, and forfeit his, her, or their license; and it shall not be lawful for any officer of the District to issue a license to any person or persons, or their agent or agents, whose license may be forfeited under the provisions of this act for one year after such forfeiture: *Provided*, That the provisions of this act shall be enforced by information in the Police Court of the District of Columbia, filed on behalf thereof by its proper attorney or attorneys, subject to appeal to the Criminal Court of the District of Columbia in the same manner as is now or may be hereafter provided for the enforcement of the District fines and penalties under ordinances and law.

"Sec. 5. *And be it further enacted*, That all acts and parts of acts inconsistent herewith are hereby repealed."

Corporation Laws of Washington, D. C.

"AN ACT to license, tax, and regulate Hotels, Taverns, Ordinaries, Restaurants, and Tippling-houses.

"Sec. 4. That every person who shall apply for a restaurant or eating-house license shall produce to the Mayor a certificate signed by the commissioner or person acting as commissioner of improvements and six respectable free-

holders residing in the same square, or the next adjacent square, or the square opposite to the one in which such person resides, which certificate shall set forth that the said commissioner or person acting as commissioner and each of the said six respectable freeholders have personally examined the premises for which application for a license is made, and that they are satisfied that the person making application hath provided on said premises suitable and proper accommodations for guests, so that said guests may be supplied with such eatables that they may require at any hour that the same may be called for."

"Sec. 10. That all keepers of hotels, taverns, ordinaries, and restaurants be, and they are hereby prohibited from selling spiritous and fermented liquors, wines, cordials, and all other intoxicating liquors to any minor; and all keepers of hotels, taverns, ordinaries, and restaurants, shall be, and are hereby prohibited from selling any kind of spiritous, distilled, or fermented liquors on Sunday, and they are hereby required to have their bars or other places where liquor is usually sold closed on Sunday during the entire day and evening; and for the first violation of any of the requirements of this section, the person or persons so offending shall be fined not less than twenty nor more than forty dollars, and for the second offence a like fine, and shall forfeit his, her, or their license, which shall be annulled by the Mayor." Approved October 31, 1864.

Corporation Laws of Washington, D. C., 12, Sixty-second Council, General Laws, Chap. 9, p. 8 (Reference No. +K859L, W2741, District of Columbia Public Library):

"An Act to regulate admission to, and accommodation in, licensed houses and places of amusement.

"*Be it enacted by the Board of Aldermen and Board of Common Council of the City of Washington*, That from and after the passage of this act it shall not be lawful for the keeper, proprietor, or proprietors of any licensed hotel, tavern, restaurant, ordinary, sample-room, tippling-house, saloon, or eating-house, to refuse to receive, admit, entertain, and supply any quiet and orderly person or persons, or to exclude any person or persons on account of race or color.

"Sec. 2. *And be it further enacted*, That if the keeper, proprietor, or proprietors of any licensed hotel, tavern, restaurant, ordinary, sample-room, tippling-house, saloon, or eating-house, or any agent acting for him or them, shall violate or offend against the provisions of this act, he or they shall be subject to a fine of not less than fifty dollars for each violation thereof, to be recovered in an action of debt, in the name of the Mayor, Board of Aldermen, and Board of Common Council of the city, on information filed before any police magistrate.

"Sec. 3. *And be it further enacted*, That in lieu of the penalties provided in an ordinance entitled 'An act regulating admission to places of public amusements,' approved June 10, 1869, for the offense therein mentioned, the penalty mentioned in the second section of this act is hereby substituted, and hereafter shall be applicable to and enforced, as herein provided, for any violation of said act of June 10, 1869.

"Sec. 4. *And be it further enacted*, That after the final conviction of any party for the violation of any of the provisions of this act, or of that of June 10, 1869, referred to in the preceding section, and the recovery of the fine, a sum equal in amount to one-half of such fine shall be paid, and warrant drawn in the usual form out of the general fund, to the party who may have been the informer in any such case.

"Sec. 3. *And be it further enacted,* That all acts or parts of acts that are inconsistent with the provisions of this act are hereby repealed." Approved March 7, 1870.

Corporation Laws of Washington, D. C., 13, Sixty-seventh Council, General Laws, Chap. 42, p. 22 (Reference No. +K859L, W2741, District of Columbia Public Library).